1-225

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~313.~~ 93

MARIE A. N. POLLARD, PLAINTIFF IN ERROR,

vs.

JACOB LYON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 3, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 313.

MARIE A. N. POLLARD, PLAINTIFF IN ERROR,

vs.

JACOB LYON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said court before you, between Marie A. N. Pollard, plaintiff, and Jacob Lyon, defendant, No. 7961, a manifest error hath happened to the great damage of the said plaintiff, as by her complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United Statss should be done.

Witness the honorable Salmon P. Chase, Chief-Justice of the United States, this 6th day of February, in the year of our Lord 1873, and of the Independence of the United States the 97th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To JACOB LYON:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Marie A. N. Pollard is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness chief-justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Chf. Just.

Service acknowledged.

W. D. DAVIDGE.

FEB'Y 15, '73.

(Indorsed:) 7961. Law. Pollard v. Lyon. Writ of error and citation, and services, Feb'y 15, '73. Filed Feb. 15, 1873. R. J. Meigs, clerk.

2 In the supreme court of the District of Columbia, the day of , 18 .

MARIE A. N. POLLARD
vs.
JACOB LYON. } At law. No. 7961. In error.

Know all men by these presents that we, Marie A. N. Pollard and

Horace Johnston, are bound unto the above-named Jacob Lyon in the sum of two hundred and fifty dollars to be paid to the said Jacob Lyon, his executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this 15 day of February, 1873.

Whereas the above-named Marie A. N. Pollard hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Marie A. N. Pollard shall prosecute her said writ of error to effect, and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

M. A. N. POLLARD. [SEAL.]
H. S. JOHNSTON. [SEAL.]

Sealed and delivered in presence of—
A. THOS. BRADLEY,
as to M. A. N. Pollard.

The foregoing bond is hereby approved this 15th day of Feb'y, 1873.
D. K. CARTTER,
Chief Justice, &c.

3 In obedience to the foregoing writ of error, a true copy of the record and of all proceedings in the cause in said writ mentioned is herewith transmitted as follows, to wit:

Declaration.

In the supreme court of the District of Columbia.

MARIE A. N. POLLARD
v.
JACOB LYON. } No. 7961. At law.

The plaintiff sues the defendant for damages done by the defendant to the plaintiff in speaking of her certain false and slanderous words, and she says, to wit, that on the 25th day of September, 1870, the said defendant, speaking of the plaintiff, falsely and maliciously said, spoke, and published of the plaintiff the words following: "I saw her in bed with Captain Dentry."

And at another time, to wit, on the said 25th day of September, 1870, the defendant falsely and maliciously spoke and published of the plaintiff the words following: "I looked over the transom-light and saw Mrs. Pollard (meaning the plaintiff) in bed with Captain Denty;" whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in this action in the sum of ten thousand dollars.

DREW & BRADLEY,
Attys. for Plff.

Notice to plead.

The defendant is to plead hereto on or before the first special term of

the court occurring twenty days after service hereof; otherwise, judgment.

DREW & BRADLEY, JR.,
Attys. for Plff.

4 *Order to file.*

Clerk will file this nar., &c., and issue as above.

DREW & BRADLEY, JR.,
Attys. for Plff.

Filed 13 Dec'r, 1870.

Summons.

In the supreme court of the District of Columbia, the 13th day of December, 1870.

MARIE A. N. POLLARD, PLAINTIFF,
v.
JACOB LYON, DEFENDANT. } At law. No. 7961.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why she should not have judgment against you for the cause of action stated in her declaration.

Witness D. K. Cartter, chief-justice.

R. J. MEIGS, *Clerk.*

DREW & BRADLEY.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

Issued 13 December, 1870.

Marshal's return.

Served copies of the declaration, notice to plead, and summons, on the defendant the 13th day of Dec'r, 1870.

A. SHARP, *Marshal.*

5 *Plea.*

MARIE A. N. POLLARD
v.
JACOB LYON. } No. 7961. At law.

The defendant, for plea, says that he is not guilty, as alleged.

W. D. DAVIDGE AND R. B. WASHINGTON,
Attys. for Deft.

Mr. MEIGS, *Clk., &c.:*

File this plea.

W. D. DAVIDGE,
R. B. WASHINGTON,
For Deft.

JAN'Y 14, 1871.

Filed 14 January, 1871.

Replication.

In the supreme court of the District of Columbia.

MARIE A. N. POLLARD
v.
JACOB LYON. } No. 7961. At law.

The plaintiff joins issue upon the defendant's plea.

BRADLEY & BRADLEY AND DREW,
For Plff.

Clerk will file this rep. B. & B.
Filed 16 Jan'y, 1871.

Note of issue.

In the supreme court of the District of Columbia.

Bradley & Bradley, Drew for plff.
Davidge & Washington, for deft.

MARIE A. N. POLLARD
vs.
JACOB LYON. } At law. No. 7961.

Last pleading in the above cause filed January 16th, 1871.

BRADLEY & BRADLEY AND DREW,
For Plff.

Filed 16 Jan'y, 1871.

6 *Caption.*

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court for said District, commencing the third Monday of October, 1871.

Trial.

FRIDAY, *January* 5, 1872.

Session resumed pursuant to adjournment. Justice MacArthur presiding.

MARIE A. N. POLLARD, PLFF.,
vs.
JACOB LYON, DEFENDANT. } At law. No. 7961.

And now come as well the plaintiff as the defendant, by their respective attorneys, and a jury of good and lawful men of this District, to wit, William T. Doniphan, William Fletcher, J. F. Young, John J. Pfluger, Robert A. Griffon, Charles Wilson, William Lee, Thomas H. Barrow, George P. Bohrer, Benjamin Summey, Henry B. Walker, and William H. Langley, who, being sworn to try the issue above joined, are respited till to-morrow morning, at the meeting of the court.

SATURDAY, *January* 6, 1872.

MARIE A. N. POLLARD, PLFF.,
v.
JACOB LYON, DEFENDANT. } At law. No. 7961.

And now again come here as well the plaintiff as the defendant, by their respective attorneys, and the same jury who were respited
7 yesterday; and the said jury, after a further hearing of *of* the case, are again respited till the meeting of the court on Monday.

MONDAY, *January* 8, 1872.

MARIE A. N. POLLARD, PLFF.,
vs.
JACOB LYON, DEFENDANT. } At law. No. 7961.

And now again come here, as well the plaintiff as the defendant, by their respective attorneys, and the same jury, who were respited yesterday; and, after a further hearing of the case, the said jury is again respited till ten o'clock to-morrow morning.

TUESDAY, *January* 9, 1872.

MARIE A. N. POLLARD, PLFF.,
vs.
JACOB LYON, DEFENDANT. } At law. No. 7961.

And now again come here as well the plaintiff as the defendant, by their respective attorneys, and the same jury who were respited yesterday; and the said jury, after a further hearing of the case, are again respited till the meeting of the court to-morrow morning.

Verdict.

WEDNESDAY, *January* 10, 1872.

MARIE A. N. POLLARD, PLFF.,
vs.
JACOB LYON, DEFENDANT. } At law. No. 7961.

And now again come here as well the plaintiff as the defendant, by their respective attorneys, and the same jury who were respited yesterday; and the said jury having received the instructions of the
8 court retire to consider of their verdict, and returning into court upon their oath say they find the issue above joined in favor of the plaintiff, and that they assess the damages by her sustained, by reason of the grievances complained of, at the sum of ten thousand dollars, besides costs.

And thereupon the defendant, by his attorney, Mr. Washington, gives notice that he will move the court for a new trial.

Motion for new trial.

SATURDAY, *January* 13, 1872.

MARIE A. N. POLLARD
vs.
J. E. LYON. } 7961. Law.

The defendant, by his attorneys, moves for a new trial:
1. On the bills of exceptions.

2. Because the damages were excessive.
3. Because a material & competent witness for the defendant, Marcus Hook, who had been subpœnaed & had been in attendance, left this District just as said trial was coming on, & for the purpose of avoiding testifying in said cause, without the knowledge or consent of defendant, & his absence was not known to defendant until the plaintiff had nearly closed her testimony, and it was impossible for defendant then to procure his attendance. Defendant expected to prove by him the fact that the plaintiff was in the chamber of Capt. Denty on the
9 occasion to which the declaration refers.

DAVIDGE, COX,
Attys. for Deft. J. E. Lyon.

Personally appears Jacob E. Lyon and makes oath on the Holy Evangely, that the facts stated as above are true, this 13th January, 1872.

R. J. MEIGS, *Clk.*

By L. P. WILLIAMS, *Ass't Clerk.*

Motion for new trial overruled.

SATURDAY, *January* 20, 1872.

MARIE A. N. POLLARD, PLFF.,
vs.
JACOB LYON, DEFT. } At law. No. 7961.

Upon argument of defendant's motion for a new trial, addressed to the discretion of the court, it is considered that the same be, and hereby is, overruled. Appeal prayed by defendant.

Bills of exceptions filed.

And thereupon the defendant files his two bills of exceptions to the rulings of the court on the trial of the case, duly signed and sealed, and prays that they may be made part of the record, which is accordingly done.

Motion in arrest of judgment.

The defendant, by his attorneys, moves in arrest of judgment, on the ground that the words complained of in the declaration are not actionable, and because the declaration does not state a cause entitling
10 the plaintiff to a recovery, and therefore judgment cannot properly be entered on the verdict.

Ordered, that the above motion be heard in the general term in the first instance.

1st bill of exceptions.

MARIE [POLLARD]
v.
JACOB E. LYON. }

At the trial of this cause, the plaintiff, to maintain the issue on her

part joined, offered evidence tending to shew that in the year 1870, she was the principal or proprietress of the St. Cloud hotel, in Washington; and further offered the evidence of one Wm. F. Martin, who testified that on or about the 19th of September, 1870, the defendant said in his presence of the plaintiff the words: "I saw her in bed with Capt. Denty."

One McKenzie Wilson also testified that on or about the same day aforesaid he heard the defendant say in the office of said hotel to another person that Capt. Denty *were* in bed with Mrs. Pollard.

One C. C. Smith also testified that on or about the same day aforesaid, the defendant stated to him that he had caught the plaintiff and that damned scoundrel together.

One Henry Yeatman testified that a few days after said 19th of Sept., 1870, the defendant in his presence accused the plaintiff of having been in bed with Capt. Denty, and said of her that he had caught her
11 in Denty's bed, or had caught Denty in her bed, witness does not recollect which.

On' R. M. Clayton testified that the defendant, on the night of Sept. 18th, 1870, or towards morning, stated to witness that he had caught Capt. Denty in flagrante delicto with Mrs. Pollard in Capt. Denty's room; that he had caught Denty fucking that damned bitch, meaning the plaintiff; that he had been looking over the transom of the room, & he & another had been watching them for some time.

The plaintiff then rested.

The defendant then offered evidence in regard to the general character and reputation of the plaintiff for chastity, before and after the time of the alleged slander; and also evidence tending to shew that the defendant had reasonable ground and probable cause for believing that the plaintiff was in the situation alleged in the said words spoken of her. And then rested.

The plaintiff then offered rebutting evidence as to her general character & reputation, and, one of the witnesses having been examined in chief as to her reputation in Richmond, the defendant, on cross-examination, inquired of the witness what was her reputation in other places, to which the plaintiff objected, and the court sustained the objection; to which ruling, the defendant by his counsel, excepts and prays
12 the court to sign, seal, and enrol this his first bill of exceptions, which is accordingly done this 10th day of January, A. D. 1872.

ARTHUR MacARTHUR, *Justice.* [SEAL.]

After the evidence closed, the defendant asked the court to instruct the jury as follows:

Instructions asked by deft.

1. The jury ought to find a verdict for the defendant, unless they are satisfied from the proof, that the defendant used, of and concerning this plaintiff, the language set out in the declaration or language substantially identical, and evidence to the effect that the defendant accused the plaintiff of having been in bed with Captain Denty; or declared to others, that she was in bed with him, or stated that he had caught her with that damned scoundrel, meaning Denty; or had caught her in Denty's bed, or him in her bed; or had caught her in his room, is not competent, and is not to be considered by the jury as proof of the alleged slander.

2. That, upon the whole evidence offered, on the part of the plaintiff,

if believed by the jury, the only words spoken by the defendant of or concerning the plaintiff, for which the plaintiff would be entitled to recover a verdict in this action, are those testified to by the witnesses, Martin and Clayton; and even if the jury believed said words were spoken falsely and maliciously and without reasonable ground for believing that the plaintiff was in bed with Captain Denty, as stated,
13 they can only allow damages for the injury done to the plaintiff by speaking the words in question.

But the court refused, and instead of the said instructions prayed, gave the following:

The court gives the following instructions instead of the first and second instructions asked for by the defendant's counsel.

Instructions given by court.

The only words for which the plaintiff can recover damages in this action are those alleged in the declaration. The words alleged in the first count to have been spoken by the defendant of and concerning the plaintiff are, "I saw her in bed with Captain Denty;" and in the second count, "I looked over the transome light and saw Mrs. Pollard in bed with Captain Denty." The testimony of the plaintiff's witnesses must show that the defendant spoke these words either litterally or in substance. And the jury ought to find a verdict for the defendant, unless they are satisfied from the proof, that the defendant used of and concerning the plaintiff the words set out in the declaration or language substantially identical; and evidence showing that the defendant had spoken the precise language in the declaration, or that he had caught her in bed with Captain Denty; or that she was in bed with Captain Denty, or that he accused her of being in bed with Captain Denty, may properly be considered by the jury for the purpose of sustaining the declaration, as, in the opinion of the court, such expressions are substantially like those in said declaration. But, on the other hand, evidence to
14 the effect that defendant only said to the witnesses, that he had caught them together; or caught her with him; or had seen her with him; or had seen her in Denty's room, are not competent to be considered by the jury as proof of the alleged slander, for they do not substantially conform to the words set out in the declaration.

2d exception.

And to the refusal of the court to grant the instructions asked or either of them, as well as to the granting of said instructions in lieu of them, and to said charge, the defendant, by his counsel excepts and prays the court to sign, seal, and enrol this his second bill of exceptions, which is accordingly done, this 10th day of January, A. D. 1872.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Proceedings before the supreme court of the District of Columbia in general term, commencing on the first Monday and first day of January, 1872.

Present, Chief-Justice Cartter, alone.

Ordered that the court be adjourned till Monday the fifteenth of January, 1872, at 12 o'clock noon.

MONDAY, *January* 15, 1872.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter, and Justices Olin, Humphreys, and MacArthur; Justice Wylie absent, holding the equity court.

15 FRIDAY, *May* 10, 1872.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter, and Justices Olin, Humphreys, and MacArthur.

Judgment arrested.

MARIE A. N. POLLARD, PLFF.,
vs.
JACOB LYON, DEFENDANT. } At law. No. 7961.

And now again come here, as well the plaintiff as the defendant, by their respective attorneys; and thereupon the plaintiff, by her attorney, moves the court that she have judgment in her favor upon the verdict aforesaid; but, because it seems to the court here that the declaration is bad in substance, it is considered that the plaintiff take nothing by her suit, and that the defendant go thereof without day, and recover against the plaintiff $, the costs of his defense, and have execution thereof.

THURSDAY, *May* 18, 1872.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter, and Justices Wylie and Humphreys.

Motion to vacate judgment & to amend.

MARIE A. N. POLLARD, PLFF.,
vs.
JACOB LYON, DEFENDANT. } At law. No. 7961.

16 And now again come here the plaintiff, by her attorneys, and moves the court, 1st. To strike out the order of the court in (the) above-entitled cause, sustaining the motion in arrest of judgment, and for a venire facias de novo in said cause. 2d. Also, for leave to amend the declaration with colloquia and averments, so that it shall appear by the words averred in said declaration that the defendant charged the plaintiff with having committed adultery, fornication, and open lewdness; and also averments of special damages.

BRADLEY & BRADLEY, *for Plff.*

MONDAY, *May* 20, 1872.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter, and Justices Wylie and Humphreys.

Motion relinquished.

MARIE A. N. POLLARD, PLFF.,
vs.
JACOB LYON, DEFENDANT. } At law. No. 7961.

And now comes the plaintiff, by her attorney, A. G. Riddle, and relinquishes her motion aforesaid.

Precipe for writ of error.

THURSDAY, *February* 6, 1873.

MARIE A. N. POLLARD,
vs.
JACOB LYON. } No. 7961.

17 The clerk will please issue writ of error in this case.

JOS. H. BRADLEY, JR.,
Atty. for Plff.

18 *Opinion of the court, by Justice Humphreys.*

MARIE A. N. POLLARD,
vs.
JACOB LYON.

We think that in the rulings of the circuit justice there was no error. The motion in arrest of judgment is heard in general term. Now in the first instance, the words spoken by the defendant, and charged in the declaration are: "I saw her, (the plaintiff,) in bed with Captain Denty."

It has been settled that "at common law, words which, if true, would subject the accused to infamous punishment, or to an indictment for a crime involving moral turpitude, are, in themselves, actionable without averment or proof of special damage."

The rule must have been so settled on the ground that, as between men, a charge made by one against another, could result in no serious injury, as a general rule, unless the charge, if true, would subject the party of whom the words were spoken to the inconvenience and dangers of an indictment in which the public would be arrayed against him.

It may be true, that, as a general rule, a man suffers no real damage from words which, if true, would not be followed by an indictment and punishment.

Be the reason what it may, we find the rule and cannot depart from it.

Rude as the generation that established the rule may be thought to have been, it probably did not occur to them that the same rule
19 would *to* be applied in a more refined age, so as to protect the defamer of woman's character from responding in damages for the looseness of his tongue. Or, it may not have entered the mind that time would come when men could wantonly assault the reputation of woman's chastity.

But we are bound down, manacled by the stubborn rule of authority, and the remedy is by the legislative authority.

The words in this case import nothing else legally, according to the common, ordinary acceptation of those words than a modest way of charging illicit intercourse between a man and a woman.

The more delicate and covered the charge, the keener the injury.

When the defendant said "I looked over the transom-light and saw Mrs. Pollard in bed with Captain Denty," who could doubt his meaning? If the charge was true, defendant could have justified; if untrue he should be held to answer for the wrong committed.

It may be regretted that the rule in Ohio and Iowa is not the rule of the common law as governing us.

But we are bound by the rule, that the charge must be in w rds

which, if true, would subject the accused to an indictment. There is moral turpitude in the charge made, but the plaintiff could not be indicted even if the truth of the charge was established, nor subjected to infamous punishment.

The act of Maryland, of 1749, removes the implication of corporal punishment for fornication, and the act of 1786 repealed all proceedings for punishment of fornication.

We think that we are forced, however reluctant to do so, by the mandate of authority, to arrest the judgment.

I, Return J. Meigs, clerk of the Supreme Court of the District of Columbia, hereby certify that the foregoing writings are true copies of originals on file and of record in this office, and that said originals together constitute the entire record of the proceedings of said court in the above intitled cause.

In testimony whereof I do hereunto subscribe my name and affix the seal of said court, this 6th day of February, 1873.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 313. Marie A. N. Pollard, plaintiff in error, vs. Jacob Lyon. Dist. of Columbia, Sup. Ct. Filed 3d November, 1873.

Supreme Court of United States.

NO. 93. OCTOBER 9, 1875.

MARIE A. N. POLLARD
vs.
JACOB LYON.

In error to the Supreme Court of the District of Columbia.

This was an action on the case for slander; the declaration was as follows:

The plaintiff sues the defendant for damages done by the defendant to the plaintiff in speaking of her certain false and slanderous words, and she says to wit: that on the 25th day of September, 1870, the said defendant, speaking of the plaintiff, falsely, and maliciously said, spoke and published of the plaintiff, the words following: "I saw her in bed with Captain Denty.

And at another time to wit: on the said 25th of September, 1870, the defendant falsely and maliciously spoke and published of the plaintiff the words following: "I looked over the transom light, and saw Mrs. Pollard [meaning the plaintiff] in bed with Captain Denty." Whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in this action in the sum of ten thousand dollars.

Plea. Not guilty (p. 4); verdict for plaintiff ten thousand dollars (p. 5.)

Motion in arrest of judgment (p. 6.)

Judgment arrested (p. 9); opinion of the Court (p. 10 and 11.)

As to the motion in arrest of judgment.

I.

It alleges the words spoken are not actionable.

It is conceded, and is the law, that if the words are actionable, special damages need not be alleged.

We propose to show that the words are actionable in themselves.

The act of the Assembly of Maryland, 1715, ch. 27, secs. 2, 3, is in force in this District.

This act was in force at the time of the cession of this District, has never been repealed, and has been enforced by the courts of this District.

The words charged import the offence of adultery, accordingly as the jury may find the plaintiff was married or single.

The act of 1785, ch. 47, sect. 4, repeals so much of the acts of 1715, as provides the *mode* of procedure; but the offence of adultery still remains criminal, and is punished as such.

The distinction taken by the defendant is, that although the words spoken may import that the plaintiff has committed either "fornication" or "adultery," they are not actionable, *per se*, because they are here punishable by only a pecuniary fine.

This distinction is seeming and not real. It proceeds upon a mistaken view of the principle on which the plaintiff's right of action depends, and is at variance with the weight of ancient and modern authority.

There is scarcely any one subject of judicial interpretation and inquiry as to which there is so great a diversity of opinion as the action on the case for words. In Comyn's Dig., Vol. 1, p. 273, 4th Edition, note, it is said "that words are actionable or not will be more satisfactorily determined by accurate application of the "principles on which such actions depend, than by a "reference to adjudged cases, especially in the more "ancient authors.

So also in 1 Taunton, 44, it is decided that "any words from which damage results are actionable."

Baron Comyn says, Com. 15th Edi., vol. 1, Action upon the case for defamation, letter D, 9, this "action lies for words charged that subject to an indictment."

Mr. Chief Justice Parker, in 13 Mass., 252,—an authority scarcely inferior to Baron Comyn, says, "It may be "laid down as a general principle that all defamatory "words published maliciously of another, are action-"able."

The same learned judge, in Miller vs. Peacock, 8 Pickering, 374, says, that it is objected that a charge of fornication is not actionable, because it is not a crime by common law, nor punishable by statue with an ignominious punishment. This is not a valid objection. "Whenever an offence is charged, which, if proved, may subject to punishment, though not *ignominious*, but which brings *disgrace*, such accusation is actionable."

In 7 Conn., 707, Hosmer, Justice, says: "By the common law of this State, imputing to a married or single woman, violation of chastity is actionable."

In Brooker v. Coffin, 5 Johns, 188, cited in 1 Am. L. Cases, p. 82, it is laid down that the general rule is well settled that the slanderous words are not actionable, *unless* "the charge, if true, will subject the party charged

to an indictment for a crime *involving moral turpitude*, or subject him to an infamous punishment." This opinion is said by the court in Miller v. Peacock, to state such a case as falls within the rule for the support of such actions.

"It is universally agreed, that words imputing (importing) an offence against morality, are not actionable, *unless* the offence is *indictable* or *punishable* at the time the words are uttered.

Harvey v. Boles, 1 Penrose & Watts, 12.
Weirbach v. Trone, 2 Watts & Sergeant, 408, 409.
Williams v. Karnes, 4 Humphreys, 9.

In 1 Am. L. Cas., p. 98, 5 edi., it is stated by the author that Mr. Starkie's rule "that words to be actionable in themselves must impute some *crime* or *misdemeanor* for which *corporal* punishment may be inflicted in a temporal court," "is erroneous in two respects: it is not always necessary that the offence should be punishable by a corporal punishment; and that circumstances will not always be sufficient to render the imputation of an offence slanderous."

"The case of Brooker v. Coffin appears to have reached the true principle and thereby to reconcile the conflicting definitions in the earlier English cases. According to the criterion there established, *the circumstance of an offence being penal*, and of *infamy* attaching *either to the offence*, or to the punishment, will render an imputation of that offence slanderous."

The criterion in the first part of the rule is, "that the imputed offense be indictable, or *otherwise punishable*, and should involve moral turpitude," and it is approved, and applied in—

Widrig v. Oyer, 13 Johns. 124.
Martin v. Stillwell, Id. 275.

Case v. Buckley, 15 Wend., 327.

Bissell v. Cornell, 24 Id., 354.

Young v. Miller, 3 Hills, N. Y., 21.

It is not necessary that legal infamy attach. So far as that element is concerned it is sufficient if the offence is infamous or disgraceful in a general or moral sense."

See Crawford v. Wilson, 4 Barb. S. Ct., 505, 511.

Van Ness v. Hamilton, 19 John, 349, 367, 3 Hills, N. Y., 21.

Malone v. Stewart, 15 Ohio, 319.

In Alabama the rule is applied where the offence is punishable by fine, and was morally base and wicked. It obtains also in New Jersey, Delaware, Michigan, Georgia, Pennsylvania, South Carolina, Massachusetts, Iowa, and Vermont. See 1 Am. L. Cases, 5 Ed., pp. 95, 96, 97, 98, 99, 100.

In Indiana they do not seem to have decided between Starkie's rule, and that in Brooker v. Coffin.

In New Hampshire the imputation should be of "a crime punishable by law."

In Maryland it must impute a "crime which subjects the plaintiff to punishment." Sheely v. Biggs, 2 Har., and J., 363.

The English rule is, "the words to be actionable must impute a criminal offence. Says Alderson, Baron, in Henning v. Power, 10 Meeson and Welsby, 564, 570, "that is, the words, if true, must be such that the plaintiff would be guilty of a criminal offence." See also Edsall v. Russell, 5 Scott, new, 801, S. C., 2 Dowling, N. S. 641.

The cases in New Hamphire and Maryland, except that in 17 Maryland, where the plaintiff was a man, do not conflict with the general rule, if by the word "crime"

is meant something inherently immoral; and by the word "punishment," the second class of punishments, defined by Bouvier to be "not *corporal* punishment," "such as fines, deprivation of office," &c., &c.

It is true Mr. Starkie, at page 43, does say, "that where the penalty for the offence is merely pecuniary, *it does not appear* that an action will lie for charging it; even though in default of payment, imprisonment shall be prescribed by statute; imprisonment not being the primary and immediate punishment for the offence;" but he cites no authority for the principle.

Opposed to this, however, we have in this country the Editors of the American Leading Cases, 1 vol., (mar.) 88, the elaborate work, or rather compilation, of Mr. Townshend, on slander, p. 204, § 152, 153, 153 (a) 154, 155, 156, 157, 158—the equally well collated cases by Mr. Hilliard, in his work on Torts, 1 vol. p. 264, § 29; and, finally, that of Mr. Heard on libel and slander, § 24, who says "an action will lie for all words spoken of another "which impute to him the commission of a crime involv-"ing moral turpitude, and which is punishable by law." However great may be the authority of Mr. Starkie, and his work was long received as an institute of the law on this subject, the progress of judical authority, and the learned writers of the profession on this subject since his day more than counter-balance the weight of that authority.

And this view of the American authorities is supported by morals and sound logic.

We must look to the reason and ground of the action. These are two fold; *first* the loss of character, and *second* the hazard of a criminal prosecution. There is a third ground; and that is to prevent breaches of the peace; and this in modern times is exhibited in the legislation of some of the States.

In Van Ankin v. Westfall, 14 Johns, 233, (and in Shipp v. McCrane, 3 Murphy, 463, 466), the court says the action of slander is always for the loss of character, and not the danger of punishment. And in Eastland v. Caldwell, 2 Bibb. 21, 23, the court says it is also the hazard of a criminal prosecution.

The latter is the received opinion, while it is equally true that to charge a man with having been guilty of a crime for which he has already been punished or pardoned, is actionable. See Starkie on Slander, 18, 19, and Townshend, § 158, and numerous cases cited by him.

In the case at bar, the words charge a criminal offence, and an offence involving degradation in society, and moral turpitude.

The authorities cited show that in such case the words are actionable *per se.*

But words imputing want of chastity in a female, according to the weight of authority, are actionable without proof of special damage.

Truman v. Taylor, 4 Iowa, 424; Pledger v. Hatchcock, 1 Kelly, 550; Good v. Berked, 1 Mod., 32; Vandulip v. Roe, 23 Penn., 82; Miller v. Parish, 8 Pick., 384; Kerney v. McLaughlin, 5 Gray, 5; Abshire v. Kline, 3 Ind., 115; or any defect which degrades her in society. Malone v. Stewart, 15 Ohio, 319; Symonds v. Castor, 32 N. H., 458; Willams v. Holdridge, 22 Barb., 396, and the numerous cases cited in American Leading Cases, Hilliard, Heard, and Townshead, already referred to.

The plaintiff in error relies on the case in 17 Mary'd, 183. That case apparently rests on the authority of the case in 6 H. & J., 248, and the passage in Starkie, 43. On examination it will appear that the decision rests upon the passage in Starkie, for they say, p. 187, "It was contended by the appellant's counsel that adultery

was made a crime by the act of 1715, ch. 27; *but by that act the penalty was made a pecuniary fine.*" The case in 6 H. & J., 248, was argued on one side only. The opinion of the court is in two short sentences, and gives no reason for the ruling in this respect, except that the weight of authority is in favor of the rule adopted by the court, and yet they do not cite one single authority. Such a decision is entitled to but little weight.

Fornication by the law of that State was punished criminally equally with adultery, and was so decided in 5 Gill, 90; 10 Mary'd, 164, construing the acts of 1715, ch. 27, and the various supplements and amendments down to 1796, already cited.

The only case cited, argued by the counsel for the defendant in the case in 17th Mary'd, is that of Dorsey v. Whipp, 8 Gill, 462. But there the charge did not involve "moral turpitude," "degradation in society," or "such disgrace as would separate him from respectable associates."

It rests, therefore, solely on the passage in Starkie, and that has been already answered. He also relies on 26 Georg., 606. That case was decided expressly on the ground that adultery was not a crime under the laws of Georgia. It does not, therefore, impugn in the least the ground taken by us, and supported by such a host of authorities.

The case in 2 Blackford, 20, when carefully considered, does not support the point to which it is cited. But if it does it is irreconcilably different from the later case in 3d Indiana, 115, and see Smelt v. Silence, 4 Iow., 424–35, 429; Gooden v. Tappan, 1 Ohio, 60; Seaton v. Todd, Wright, 317; Wilson v, Runyon, Ib. 651; and Malone v. Stewart, 15 Oh., 319; already cited. Walton v. Singleton, 7 S. & R., 449; Hartting v. Orr, 10 Watts. 245, 248; Beiner v. Bushfield, 1 Watts, 23; Miller v.

Parish, 8 Pick., 384—already cited; Francis v. Fowler, 2 Conn., 707; Smith v. Minor, Cox, N. J. 16; and in 19th Maryland, Garrett v. Dickinson.

The progress of public opinion showing, what the common rule is or ought to be, is exhibited by the statutory enactments of various states in which the courts had decided the other way, providing remedies, by action in precisely such cases as this, so that it may be very safely said the common law of the land gives the right of action: see 2 Am. Lea. Ca., 90, (Mar.) to which add act of Maryland, 1838, ch. 114; Perry v. Bright, 4 Maryland, 430, and Townsend, § 153.

II.

But the defect in the declaration, although it would have been fatal on demurrer or judgment by default, is cured by the verdict.

Sergt. William (note 1) Stennel v. Hogg, 1 Saund. 223, says: "where there is any defect, imperfection, or omission, in pleading, which would have been a fatal objection on demurrer, yet, if the issue joined be such as necessarily required on the trial, proof of the facts so defectively or imperfectly stated or omitted, and *without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict by common law;*" and he cites a long list of authorities, and on p. 29 (top) he illustrates the rule as follows: "So in an action for malicious prosecution, it is necessary to allege in the declaration, that the prosecution is at an end." "*The want of this averment is cured after verdict.*" But it is fatal upon demurrer, or a judgment by default for the original prosecution may either be determined, or it may still be regularly going on; and how can the Court determine the fact? But where there is a verdict

for the plaintiff, *it is a necessary inference that it was proved on the* trial, that the original prosecution was at an end." And to the same effect is Tibb's Prac. 919, &c.

This being the rule, and taking this illustration, the alleged defect in the declaration is cured by the verdict. In the cases cited by Saunders, the right to bring and maintain the action rests wholly upon the fact whether the plaintiff had been acquitted in the prosecution against him.

Here (granting the position taken by the defendant), the right to bring and maintain the action depends on the further fact whether she had or not sustained special damage. As in the case of malicious prosecution the plaintiff was at liberty to prove that the prosecution was at an end, without which he had no right of action; so in this case the parties having gone to trial on the general issue the plaintiff must have been at liberty to prove special damage, without which she was not entitled to recover at all. And, in the language of Williams, " it is not to be presumed that the judge would direct the jury to give a verdict" unless such proof was given. The record shows, p. 8, that he did instruct them.

It is contended on the other side that the right of action depends on the fact that special damage resulted from the spoken words, and therefore special damage must be averred and proved. The issue joined necessarily required on the trial proof of the fact omitted from the declaration " in order to plaintiff's recovery. If the defendant had demurred he would have had every advantage to which he was entitled, and the plaintiff could have amended so as to present with precision her whole case. But the defendant chose to go to trial on an issue which not only admitted but required proof of the facts which gave plaintiff her right of action and thereby waived the omission in the nar of the allegation of those facts.

So far as the cases referred to by defendant's counsel show that this omission in case of slander is fatal after verdict, they are founded on the vice of considering the special damage as a collateral fact, when it is really but the incident. The action is not to recover the special damages. They may not amount to a feather's weight or a mill in value. And their introduction is but little more than one of the old figments in legal proceedings which are daily yielding with the progress of the age to more rational and less technical requirements.

We therefore submit that on both grounds there is error in the ruling of the Court below, which professes to be founded on precedent, and not upon the judicial opinion of that Court.

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Counsel for Plaintiff in Error.

In Supreme Court United States.

MARIE A. N. POLLARD,
v.
JACOB LYON.
No. 93.

Statement and Brief of Counsel for Defendant.

The declaration was as follows, viz:

The plaintiff sues the defendant for damages done by the defendant to the plaintiff in speaking of her certain false and slanderous words, and she says to wit: that on the 25th day of September, 1870, the said defendant, speaking of the plaintiff, falsely, and maliciously said, spoke and published of the plaintiff, the words following: "I saw her in bed with Captain Denty.

And at another time to wit: on the said 25th of September, 1870, the defendant falsely and maliciously spoke and published of the plaintiff the words following: "I looked over the transom light, and saw Mrs. Pollard (meaning the plaintiff) in bed with Captain Denty." Whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in this action in the sum of ten thousand dollars.

The general issue was pleaded.

Proof.

A verdict was rendered for the plaintiff for $10,000, and a motion made for a new trial on the Bills of Exceptions. A motion was also filed in arrest of judgment, and judgment was arrested.

3. The motion in arrest was properly sustained, for the words in the declaration are not actionable.

Words, to be actionable, must either impute some disreputable criminal offence, punishable in the secular courts; or 2, they must be spoken of, and tend to injure a person in his trade or occupation; or 3, must impute some offensive disease tending to deprive him of society; or 4, must have produced some special damage.

1 Amer. Lead. Cases, (5th edition), p. 95.

The words complained of in this case do not come within any of the four classes of cases. As to the 2d and 3d, remark is needless.

As to the 4th, no special damage is either alleged or proved. The general allegation, that the plaintiff has been injured in name and reputation, is not sufficient.

1 Amer. Lead. Cases, p. 119, and Seq.

It remains to consider the first class of cases.

The imputation of incontinence to a female, either generally or particularly, does not charge her with a criminal offence, punishable in the secular courts, and therefore is not actionable. The English and American authorities are full on this head.

See 1 Starkie on Slander, p. 198, and Seq.

1 Amer. Lead. Cases, p. 102, and Seq., and cases cited.

Also, Wagaman v. Byers, 17 Md., 183.
Brandt v. Townsley, 13 Wend., 254.
Castlebury v. Kelly, 26 Geo., 606.
Duke v. Clarke, 2 Blackf., 20.

With one or two exceptions not a case can be found in this country in which such imputations were held actionable which did not turn upon some statute.

II.

An old Act of Assembly of Maryland, of April, 1715, ch. 27, made both adultery and fornication punishable; but this was repealed, as regards fornication, by an act, entitled "A Supplement to the Act entitled an Act direct-"ing the proceedings against persons guilty of fornica-"tion," of November, 1785, ch. 47.

See Kilty's Acts of Assembly.

The words do not even impute the actual offence of illicit intercourse, but simply acts which were as much evidence of mere intention to commit it as of the actual commission. The declaration is defective in not averring other facts, at least; showing that the words meant to impute actual adultery or fornication. For the mere intent to commit one of these offences is in no legal sense criminal.

III.

It is supposed, however, that the verdict cures the defect.

In order to this it must appear that the wanting averments are fairly included in some general averment in

the declaration, and that the verdict could not have been rendered without proof of them. Stephen on Pleading, p. 162.

But no allegation in the declaration includes any allegation of special damage. It is expressly ruled that the general allegation that plaintiff has been injured in her name and reputation is insufficient. 1 Amer. Lead. Cas. p. 119, and seq. (5th Edition.)

And the jury could have found the issue made, viz: whether the words were spoken without proof of special damage, and could have given the verdict simply for the general damages supposed to flow from the alleged slander. Dorsey v. Whipp. 8 Gill, 462.

To say, that the judge would not have allowed the verdict to be given without proof of the necessary facts, is to say that the verdict cures errors of the court.

The record shows the instructions given, and that nothing was said about special damage.

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of Counsel for Defendant in Error.